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VIA MESSENGER

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Re: Petition for Reconsideration; CC Docket
No. 92-90; In the Matter of Rules and
Regulations Implementing the Telephone
Consumer Protection Act of 1991

Dear Ms. Searcy:

Submitted herewith on behalf of Xpedite Systems, Inc., pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, is an original and required copies of a Petition for Reconsideration of the Commission's Report and Order in CC Docket No. 92-90, released October 16, 1992. Public notice of the Report and Order was given by publication in the Federal Register on October 23, 1992.

Please direct any communications concerning this matter to the undersigned.

Respectfully submitted,



Bruce D. Ryan
Of PAUL, HASTINGS, JANOFSKY & WALKER

BDR:cs
Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rules and Regulations Implementing)
The Telephone Consumer Protection)
Act of 1991)

CC Docket No. 92-90

Petition for Reconsideration
Submitted on Behalf of
Xpedite Systems, Inc.

November 23, 1992

PAUL, HASTINGS, JANOFSKY & WALKER
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SUMMARY

Xpedite Systems, Inc. ("Xpedite") submits this Petition for Reconsideration addressing the portions of the Commission's Report and Order in this proceeding (released October 16, 1992) implementing the statutory prohibition on unsolicited facsimile advertisements contained in the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. Law No. 102-243 (adding new Section 227 of the Communications Act, 47 U.S.C. § 227).

Xpedite requests the Commission to modify its Report and Order by adopting a proposed definition of the statutory terms "prior express invitation and permission," which are contained within the definition of the term "unsolicited advertisement" in § 227(a)(4), but are not separately defined in the TCPA. The requested modification is necessary to ensure that the new regulations implement the statute in a manner that both is consistent with Congressional intent and intrudes in the least restrictive manner on commercial speech protected by the First Amendment. The petition states with particularity the respects in which the petitioner believes the regulations should be changed in a new definitional subsection 64.1200(f)(6).

In addition to the proposed definition of "prior express invitation or permission," Xpedite also requests certain minor clarifying changes in the regulations so as accurately to reflect determinations made in the Commission's Report and Order.

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WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
) CC Docket No. 92-90
Rules and Regulations Implementing)
The Telephone Consumer Protection)
Act of 1991)

PETITION FOR RECONSIDERATION

Xpedite Systems, Inc., ("Xpedite") by its counsel and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby submits this Petition for Reconsideration of the Commission's Report and Order in CC Docket No. 92-90, released October 16, 1992, public notice of which was given by publication in the Federal Register on October 23, 1992. The Report and Order adopts rules and regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), Public Law No. 102-243 (Dec. 20, 1991), which amended Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 et. seq., by adding new Section 227, 47 U.S.C. § 227.

I. Statement of Requested Modification

This Petition for Reconsideration addresses those portions of the Report and Order and the Rules and Regulations adopted therein relating to the TCPA prohibition on unsolicited facsimile advertisements. Xpedite requests the Commission to adopt a proposed definition of the statutory terms "prior express

invitation or permission," which are contained within the definition of the term "unsolicited advertisement" in Section 227 (a)(4), but are not separately defined in the TCPA.

Specifically, the Commission should define these terms to make clear that commercial advertising material may be transmitted to persons who have effectively indicated a willingness to receive legitimate commercial advertising material useful in the recipient's own business activities. The requested modification is necessary in order to confine the new regulations to the scope intended by Congress and to avoid or minimize impermissible intrusion on commercial speech protected by the First Amendment, while preserving reasonable privacy concerns of facsimile recipients.

The requested modification would add a new section 64.1200 (f)(6), as follows:

"(6) the terms '**prior express invitation or permission**' mean a prior request, or other expression or indication of interest, desire, or willingness, to receive material advertising the commercial availability or quality of any property, goods, or services. Such invitation or permission may be demonstrated by any of the following: (i) an established business relationship between the advertiser and the facsimile recipient; (ii) the facsimile recipient's voluntary public release of its telephone facsimile number by means of business telephone or other business or professional directories; (iii) the absence of notification by the facsimile recipient to the sender that no further advertisements should be transmitted, provided that the sender has established a

toll-free telephone number for such notifications and all transmitted materials include a statement clearly informing the recipient of that number; or (iv) other actions evidencing that the facsimile recipient has in effect given its invitation or permission to receive facsimile messages by providing a facsimile number at which it wishes to be reached for use in normal business communications."

This proposed definitional provision incorporates the basic toll-free number concept of proposals suggested by several commenters, including Mr. Fax. In addition, the proposed definition incorporates a more limited concept of "invitation or permission", embodied in subparagraphs (ii) and (iv), which would further specific Congressional intent recognized in the Commission's Report and Order (at ¶ 31). Finally, as a minor housekeeping amendment, subparagraph (i) would incorporate the "established business relationship" principle already recognized in paragraph 54, note 87 of the Report and Order.^{1/}

^{1/} To conform with this new definitional provision, the Commission should also make a minor change in Section 64.1200 (f)(6) (the definition of the term "established business relationship"), to delete the word "residential" before the word "subscriber" in each instance. This clarification would conform the definitional section of the rules' intended effect, as confirmed by the Commission in its Report and Order (at ¶ 54, n. 87), that "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient," whether the recipient is a residential or business subscriber.

II. Statement of Interest

Xpedite is an enhanced facsimile services company based in New Jersey. Xpedite's "Fax Broadcast" service, introduced in 1989, enables a customer to communicate with multiple fax locations virtually simultaneously by "broadcasting" a single transmission from a PC or fax machine through the Company's operations center. Xpedite also provides point-to-point, computer-to-fax and fax-to-computer messaging services to its customers.

The growing need for enhanced fax services and the numerous applications of fax broadcasting which address a broad range of business requirements are a direct result of the explosion in the installed base of fax terminals in the last five years. The proliferation of fax terminals and their ease of operation has caused fax usage to soar as a principal means of business-to-business communications. Both the domestic and international telephone networks are now cheaper to use in real terms and are more reliable, making fax an effective competitor to mail, courier and telex.

While the direct costs of fax transmissions are often less than courier or mail, the proliferation of fax usage has created certain significant indirect costs of business users. With a basic fax terminal, documents must be printed and physically transported to the fax machine where congestion is

often encountered. Outgoing messages block reception capability and support personnel spend considerable time sending individual and multi-address messages, photocopying and otherwise handling received faxes.

Fax broadcast services involve delivery of a document directly from a PC or fax machine to Xpedite's system, which in turn automatically broadcasts the document using hundreds of computerized fax lines, at a time specified by the originator. This process saves significant overhead in terms of labor costs for printing the document, managing the fax process and producing an audit trail documenting who on the list received the document and when it was received.

As a consequence of the marketing efforts of Xpedite and others, businesses which are dependent upon fax transmission for business-to-business communications are recognizing the need to automate and properly manage the fax sending process. In addition, businesses which would otherwise use the U.S. mail, courier, electronic mail or voice mail to transmit documents to multiple addresses are increasingly considering fax broadcast services due to its lower cost per transmission, predictable delivery and high degree of impact.

Using this system, Xpedite distributes facsimile messages of various types for its customers, including advertising, but exercises no editorial control or discretion

over the content of the messages. In each instance, Xpedit's customers provide Xpedit with the messages they wish to have distributed by facsimile. Xpedit's facsimile broadcast service has been a success in the marketplace because of the valuable service and convenience this provides to many business customers.

The Commission has made clear in its Report and Order that facsimile broadcast service providers like Xpedit, who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements, may not be held liable for any violations of Section 64.1200 (a)(3), in the absence of "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions." Report and Order, ¶ 54, quoting Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987). See Comments of SNET, Sprint and Reply Comments of AT&T, which were expressly concurred in by the Commission. The service provided by Xpedit is essentially equivalent to the service of Sprint TeleMedia described in the Comments of Sprint Corporation, filed May 26, 1992, at 5-6.^{2/}

^{2/} A minor clarification should be made to avoid any misconstruction of the Commission's statements in paragraph 54 of the Report and Order. After stating that it concurred with the commenters on this issue, the Commission inadvertently limited its next statement regarding non-liability to "common carriers," the only subject expressly addressed in Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987). In the context of the TCPA, however, Congress has made clear that
(continued...)

Nevertheless, an overbroad interpretation and implementation of the statutory prohibition on unsolicited facsimile advertisements could have a substantial adverse effect on Xpedite's business by deterring its customers from sending legitimate business material via facsimile to multiple locations through the use of Xpedite's service.

III. The TCPA Facsimile Prohibitions Should be Given a Narrow Construction, Consistent with Congressional Intent and First Amendment Concerns.

The TCPA was enacted primarily in response to complaints from consumers concerning the increasing number of telemarketing phone calls to residences from businesses with whom the consumers had little, if any, previous business contact (i.e., "cold calls"). Congress was also concerned with those telemarketers employing automated or prerecorded telephone calls. See TCPA, §2(10). In an effort to remedy this problem, the TCPA prohibits telephone calls to residential phone lines using artificial or prerecorded voice without the "prior express consent" of the called party, unless the call is initiated for

2/(...continued)
the restrictions concerning telephone and facsimile solicitation "do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message." Sen. Rep. No. 102-178, at 9 (emphasis added). Facsimile broadcast service providers thus may not be held liable for any violations of the TCPA or its implementing regulations, regardless of whether the service provider technically qualifies as a "common carrier."

emergency purposes or is exempted by rule or order of the Commission as authorized by the statute. See Section 227(b)(1)(B).

Although the Congressional findings do not address any problems associated with the use of facsimile machines for advertising, or any other purpose, the TCPA also prohibits the use of "any telephone facsimile machines, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." Section 227 (b)(1)(C) (emphasis added).^{3/} An "unsolicited advertisement" is defined by statute to mean any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(4) (emphasis added). Neither the TCPA nor the Commission regulations define what constitutes "prior express invitation or permission."

^{3/} The TCPA also sets forth technical and procedural standards for facsimile machines, primarily to identify the sender of the facsimile message. Id. at §227(d)(1). Paragraph 54 of the Report and Order, which confirms the non-coverage of entities who simply provide facilities to transmit others' facsimile advertisements, does not specify whose identifying information must be included in each facsimile transmission. Xpedita submits that, since facsimile broadcast service providers are not the real "senders" of facsimile messages, they should not be required to place their own identifying information on the facsimile transmissions for purposes of § 227(d). Rather, the originator of the information (the customers of the facsimile broadcast services) should provide this information on all of their transmissions.

The legislative history of the TCPA indicates that Congress intended only to prevent the transmission of truly "unwanted" facsimile advertisements. See, e.g., 137 Cong. Rec. H10342 (daily ed. Nov. 18, 1991) (comments of Rep. Roukema) (observing that TCPA would protect "unwilling" and "unsuspecting" customers). As the House Committee Report makes clear, the legislation "does not attempt to make all unsolicited telemarketing or facsimile advertising illegal . . . When conducted properly, unsolicited commercial calls and faxes are an established lawful marketing practice." H.R. No. 102-317, 102d Cong., 1st Sess. at 6 (1991). Accordingly, Congress acknowledged, among other things, the need to preserve both existing business relationships and the right of consenting parties to receive commercial information by telephone or facsimile.^{4/}

As demonstrated in detail by previous commenters,^{5/} the TCPA's prohibition clearly implicates protected First Amendment speech. Unless the statutory prohibition is implemented in an appropriately limited manner, it will impermissibly intrude on

^{4/} The legislative history on these points was previously reviewed in detail in a September 8, 1992 memorandum submitted to the Commission in this Docket on behalf of Mr. Fax.

^{5/} See, e.g., Comments of Mr. Fax, filed May 26, 1992, at pp. 5-12; Reply Comments of Mr. Fax filed June 25, 1992, at pp. 2-5.

the "free flow of commercial information" that the Supreme Court held to be entitled to First Amendment protection. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976); see also Central Hudson Gas & Electric v. Public Service Comm'n, 447 U.S. 557 (1980); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1991).

Regulations affecting constitutionally protected speech must be "narrowly tailored to achieve the desired objective." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989). The "desired objective" with respect to the facsimile prohibition is unclear, as the Congressional findings are silent on the issue and the legislative history is sparse. The only apparent reference to this prohibition are isolated statements that unsolicited advertisements may impede the facsimile owner's use of its facsimile machine and force the owner to pay for the cost of paper used for the advertisement. See 137 Cong. Rec. S9840-2 (daily ed. July 11, 1991) (statement of Sen. Hollings).^{6/}

The regulations implementing the unsolicited facsimile advertising prohibition are not narrowly tailored to meet these concerns, even assuming those concerns reflect Congress' desired

^{6/} See also S.Rep.No. 178, 102d Cong., 1st Sess., at 2 (1991); S. Rep. No. 177, 102d Cong., 1st Sess., at 2 (1991); (statement of Sen. Hollings); id. at 20 (statement of Sen. Preslen).

objective. The Congressional Record contains no legislative findings that would justify the Commission (or a reviewing court) in concluding that there is "no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting [facsimile owners]." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 129 (1989). Nor does the record developed in this rulemaking provide any such assurance. Rather than impose reasonable restrictions designed to address the underlying legislative concerns, the regulations purport to ban completely all unsolicited advertisements delivered via facsimile machines. Accordingly, the Commission should interpret and apply the statutory prohibition on facsimile advertising in a manner that alleviates the obvious Constitutional concerns. See Branch v. FCC, 824 F.2d 37, 47 (D.C.Cir. 1987).

The Commission's implementation of the TCPA must, of course, also reflect reasoned decisionmaking. At a minimum, this requires the Commission to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). The Report and Order and the regulations implementing the TCPA, in their present

form, do not meet this standard, as there is no factual development in the rulemaking record to support the overbroad prohibition on the facsimile transmission of much legitimate business information. Nor is there any explanation given for rejecting the proposed alternative interpretations suggested in the Comments.^{7/}

IV. The Commission Should Adopt a Regulatory Definition of "Prior Express Invitation or Permission" That Achieves a Reasonable Balance Between Commercial Speech Objectives of Advertisers and Privacy Concerns of Businesses.

As previously discussed, the legislative history makes clear that the intent of Congress in enacting the TCPA was not to ban all telephone solicitations or facsimile advertisements, but primarily those unwanted solicitations. Similarly, in its regulations, the Commission stated that the "rules are intended to impose reasonable restrictions...and to allow consumers to

^{7/} The sole justification offered for the present rules appears to be the view that the TCPA "leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition." Report and Order, at 28, n.87. While the Commission obviously may not revise the statute, it is within the Commission's authority to clarify the circumstances under which facsimile transmissions of advertising material will be deemed to be invited or permitted, and thus not be considered "unsolicited," by reasonably interpreting undefined statutory terms. See generally Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-45 (1987). Such a clarification would be especially appropriate in light of the fact that the President signed the legislation on the assumption that it "gives the Federal Communications Commission ample authority to preserve legitimate business practices." Signing Statement of President Bush, P.L. 102-243 (Dec. 23, 1991).

avoid unwanted telephone solicitations without unduly limiting legitimate telemarketing practices." 57 Fed. Reg. 48334 (Oct. 23, 1992) (emphasis added). Xpedit's requested modification furthers this intention. It also clearly comports with Congress' findings that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." TCPA, §2(9).

The definition of "prior express invitation or permission" proposed by Xpedit is consistent with available evidence of Congressional intent and would limit intrusion on protected commercial speech. The new definition would provide that a facsimile advertising message is considered to be invited or permitted when the facsimile recipient chooses not to notify the fax speaker by means of a toll-free telephone number supplied by the sender that the recipient does not wish to receive any further facsimile advertising messages.^{8/} The proposed definition would also include situations where the recipient has effectively given its invitation or permission to the caller by making its facsimile number publicly available (e.g., through publication in business telephone or related directories, etc.)

^{8/} This proposal was described in detail in submissions by Mr. Fax, and has already been implemented at the state level in California. See 1992 Cal. Stat. ch. 564 (enacted August 30, 1992).

for use in normal business communications. Such recipients are not the sort of "unsuspecting" telephone subscribers whom Congress sought to protect from receiving unwanted materials. The recipient's act of making its facsimile number available, in particular, should be deemed an affirmative expression of its desire to invite appropriate business contacts via facsimile transmission.

Indeed, in addressing the autodialing and pre-recorded message prohibition (§ 227(b)(1)(B)), the Commission's Report and Order specifically acknowledges that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." Report and Order, ¶31 (emphasis added). The Commission goes on to explain that: "Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." Id. The House Committee Report cited by the Commission as supporting this interpretation further explains that, in such instances, "the called party has in essence requested that contact by providing the caller with their telephone number for use in normal business communications." H.R. Rep. No. 102-317, 102d Cong., 1st Sess. at 13 (1991) (quoted in Report and Order, n.57).

There is no reason to interpret the facsimile advertising prohibition in a different manner. The exact same statutory phrase -- "prior express invitation or permission" -- is used both in the definition of "unsolicited advertisement" and in the term "telephone solicitation" described in House Report 102-317. See § 227(a)(3) and (4). Moreover, the legislative history indicates that the Senate deleted a requirement from the bill that all consent be in writing, thereby recognizing that consent may occur informally. See Sen. Rep. No. 102-178, at p. 5; see also House Rep. 102-317, at 13. And, in adopting the "established business relationship" provision, the Commission has recognized that invitation or permission within the meaning of the statute need not always entail an explicit request for a specific facsimile transmission.^{9/}

It would be particularly incongruous for the Commission to apply a more stringent definition of "express invitation or permission" for purposes of the facsimile advertising prohibition than the "prior express consent" required for purposes of the §

^{9/} While the regulatory definition of "established business relationship" was adopted pursuant to the Commission's express exemption authority under § 227(b)(2)(B), which is applicable only to the artificial or pre-recorded message prohibition of § 227(b)(1)(B), the exemption authority by its terms requires that any exempted calls "not include the transmission of any unsolicited advertisement." § 227 (b)(2)(B)(ii) (emphasis added). Thus, the concept of "established business relationship" must necessarily constitute "prior express invitation or permission" within the meaning of § 227(a)(4).

227(b)(1)(A) and (B) prohibitions, which include restrictions designed to avoid serious interferences with emergency and public safety communications. As noted above, the only expressed legislative concern underlying the facsimile prohibition involved the unwanted use of facsimile paper and the possible interference with other business uses of the facsimile machine where fax messages are uninvited.^{10/}

V. Conclusion

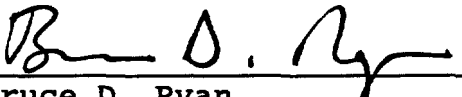
Accordingly, for the reasons stated herein, Xpedito urges the Commission to modify its rules implementing the TCPA by adopting the requested definition of "prior express invitation or permission" specified herein. The requested modification will implement the TCPA in a manner that better balances the commercial speech objectives of advertisers with the privacy concerns of businesses, minimizes interference with legitimate

^{10/} Comments submitted by National Fax List demonstrated that only .3% of recipients of unsolicited faxes (or 3 out of every 1000 recipients) complained about their receipt. The comments also showed that the cost of facsimile paper is generally less than \$.03 per page, and that most facsimile advertising is transmitted to businesses during off-peak hours. See Comments of National Fax List, filed May 26, 1992, at 2.

business communications, and promotes the efficient use of
emerging facsimile technology.

Respectfully submitted,

XPEDITE SYSTEMS, INC.

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November 23, 1992

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